

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION**

PBR, INC. d/b/a
SKAPS INDUSTRIES,

Plaintiff,

v.

ADVANCED GEOTECH SYSTEMS, LLC
and TENAX CORPORATION,

Defendants.

CIVIL ACTION FILE
NO. 2 08-CV-0041-RWS

JURY TRIAL DEMANDED

AMENDED DECLARATORY JUDGMENT COMPLAINT

PBR, INC. d/b/a SKAPS Industries (“SKAPS”), by and through its attorneys Parks Knowlton LLC, states the following for its Amended Complaint against Defendants:

1. This is an action for tortious interference and unfair competition under the common law, and an action for Declaratory Judgment pursuant to the provisions of Rule 57 of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 2201 *et seq.* The subject matter of the controversy that underlies SKAPS’ request

for a Declaratory Judgment arises under the federal Patent Laws, 35 U.S.C. §§ 1 *et seq.*, and the common law.

NATURE OF THE ACTION

2. Defendants Tenax Corporation (“Tenax”) and Advanced Geotech Systems, LLC, (“AGS”) have accused SKAPS of infringing U.S. Patent No. 7,309,188 (“the ‘188 patent”) by making, offering for sale, and selling geocomposites. Generally speaking, a geocomposite is used in the construction of landfills to form a base, alone or as part of an assembly, which collects and directs landfill drainage to related drain elements such as discharge pipes.

3. Defendants’ allegations of infringement and repeated threats of litigation, and reported acts of defamation, tortious interference and unfair competition, among other actions, create a case of actual controversy. SKAPS denies Defendants’ accusations of infringement and brings this action to obtain a ruling that SKAPS does not infringe the ‘188 patent, and/or the ‘188 patent is invalid, and/or the ‘188 patent is unenforceable.

PARTIES, JURISDICTION, AND VENUE

4. SKAPS is a Georgia corporation with a principal place of business at 571 Industrial Parkway, Commerce, Georgia, 30529.

5. Defendant Tenax is, based on information and belief, a Maryland Corporation with a principal place of business at 4800 E. Monument Street, Baltimore, Maryland, 21205. Service of the original Complaint has been made upon Tenax through its authorized agent for service of process:

Giovanni Capra
4800 East Monument Street
Baltimore, Maryland 21205

6. Defendant Tenax, upon information and belief, regularly engages in business throughout the State of Georgia and within this District. As a result of Tenax's continuous and systematic contacts with this jurisdiction, this Court has jurisdiction over Tenax.

7. Defendant AGS is, upon information and belief, a Maryland Corporation with a principal place of business at 4800 Pulaski Avenue, Baltimore, Maryland, 21205. Upon further information and belief, the address for Tenax and the address for AGS are for the same building at the same location, bordered by East Monument Street on one side and Pulaski Avenue on the other. Service of the original Complaint has been made upon AGS through its authorized agent for service of process:

Peter J. Ianniell
4800 Pulaski Avenue
Baltimore, MD 21205

or

Giovanni Capra
4800 East Monument Street
Baltimore, Maryland 21205

8. Defendant AGS, upon information and belief, regularly engages in business throughout the State of Georgia and within this District. As a result of AGS's continuous and systematic contacts with this jurisdiction, this Court has jurisdiction over AGS.

9. Counsel for Defendants Tenax and AGS has made an appearance:

John M. Bowler, Esq.
James E. Schutz, Esq.
Julie A. Tennyson, Esq.
Troutman Sanders LLP
Bank of America Plaza
600 Peachtree Street, N.E.
Suite 5200
Atlanta, Georgia 303-8-2216

10. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1332, 1338(a), and 1338(b). This Court has jurisdiction over the Defendants pursuant to the provisions of the Georgia long arm statute, O.C.G.A. § 9-10-91.

11. Venue is proper in this Court pursuant to the provisions of 28 U.S.C. §§ 1391 and 1400; and LR 3.1 NDGa, since a substantial part of the events giving rise to the claim occurred in the Northern District of Georgia.

PATENT-IN-SUIT

12. The United States Patent and Trademark Office (“USPTO”) issued United States Patent No. 7,309,188 (“the ‘188 patent”), entitled “Drainable Base Course for a Landfill and Method of Forming the Same,” on December 18, 2007. Defendant Tenax represents it is the exclusive licensee with the rights to forcefully assert or defend the ‘188 patent. All right, title, and interest in the ‘188 Patent has purportedly been assigned to Defendant AGS. A copy of the ‘188 Patent is attached as *Exhibit P-001*.

FACTS COMMON TO ALL COUNTS

13. Landfills are well known and virtually every municipality has access to a landfill where it dumps and buries the community refuse. Modern practice is to control landfill drainage – both waste fluids and runoff water – by designing and constructing landfills with elements such as impermeable linings and geocomposites. Generally speaking, after excavation and grading of a typical landfill site, an impermeable lining is installed along the bottom of the landfill to prevent drainage from seeping into the ground and causing ecological hazards.

Then a geocomposite, which looks like a layer of netting (geo-net) with a coarse filter (fabric) covering the upper and often the bottom of the geo-net, is installed above the lining. A principle function of the geocomposite is to collect and direct landfill drainage to related elements such as discharge pipes.

14. Since at least as early as 1998, SKAPS has designed, manufactured, offered for sale, sold, and distributed nationally, bi-planar (two-level geo-net core) geocomposites having various liquid-flow performance characteristics (flow values). For at least as many years, Tenax has manufactured, offered for sale, sold, and distributed nationally, geocomposites having various liquid-flow performance characteristics. Tenax is familiar with SKAPS as the two compete nationally in the geocomposite market. The value of a contract to supply the geocomposite for a landfill could easily exceed US \$1 million.

15. Upon information and belief AGS is likewise familiar with SKAPS, as AGS is related to Tenax as an entity created to merely hold patents that are then exclusively licensed to Tenax. Upon information and belief, the Defendants share a similar address, common offices, common officers and agents such as Mr. Giovanni Capra, and are under common control.

16. Patent application number 10/931,294 was filed on September 1, 2004 and issued as U.S. Patent 7,309,188 ('188 patent) on December 18, 2007. The face

of the '188 patent states AGS is the assignee. Upon information and belief, Tenax is the exclusive licensee of the '188 patent.

17. Claims 1 – 5 of the '188 patent are directed to a geocomposite or a landfill having flow rates under varying load conditions of:

“at least 19 gallons/minute/foot at a slope gradient of 33% and at least 33 gallons/minutes/foot at a slope gradient of 10%.” [Claims 1, 2, 3]...“at least 8.5 gallons/minute/foot at a slope gradient of 10%.” [Claim 4], [and] “at least 3.5 gallons/minutes/foot at a slope gradient of 10%.” [Claim 5].

Claim 6 depends from Claim 2 and further includes a bi-planar geocomposite.

18. The file history of the '188 patent indicates that during prosecution of the application that issued as the '188 patent, Defendants did not disclose to the United States Patent and Trademark Office (USPTO) Defendants' own prior manufacture, sales, or use of high-flow geocomposites reported to perform according to at least Claims 1 – 5 of the '188 patent, or Defendants' knowledge of the SKAPS bi-planar high-flow geocomposites, or Defendants' purchase of a SKAPS bi-planar high-flow geocomposite, all of which that occurred more than one year before the filing of the '188 patent.

19. Regarding Defendants' prior sales, a Tenax Sales/technical sheet with a copyright date of 2002 shows the performance characteristics of Defendant's

Tendrain brand geocomposite with a transmissivity rate of 1.8×10^{-3} m²/sec under 15,000psf. See, *Exhibit P-002*, a true and correct copy. This transmissivity rate, when converted to the units used in the '188 patent claims, exceeds the "8.5 gallons/minute/foot at a slope gradient of 10%" flow rate limitation of Claim 4.

20. Further, *Exhibit P-002* shows the Tendrain brand geocomposite with a transmissivity rate of 1.0×10^{-3} m²/sec under 25, 000psf. This transmissivity rate, when converted to the units used in the '188 patent claims, exceeds the "3.5 gallons/minute/foot at a slope gradient of 10%" flow rate limitation of Claim 5. See also, *Exhibit P-003, P-004*, a true and correct copy of a Tenax specification sheet for the Tendrain geocomposite, dated February 26, 2001.

21. On or about February 25, 2002, Adam Glassman of Geotenax Corporation (upon information and belief the previous name of Defendant Tenax) filed with the USPTO papers related to a federal trademark registration for the mark TENDRAIN (Reg. No. 74/670705). Those papers include specimens showing the manner in which the TENDRAIN mark was used in commerce over the previous several years. True and correct copies are attached as *Exhibits P-005 through P-011* and can be viewed on the USPTO website (www.uspto.gov) as part of the file history for Reg. No. 74/670705.

22. *Exhibit P-010* reveals the Tendrain product with an in-soil flow rate that meets or exceeds 33 gal/min/ft, as specified in Claims 1 – 3 of the ‘188 patent, was at least offered for sale more than two (2) years prior to the filing of the application that issued as the ‘188 patent.

23. On or about July 29, 2003, more than one year prior to the filing of the application that issued as the ‘188 patent, Defendant Tenax placed an order with Plaintiff for approximately half a million square feet of Plaintiff’s high-flow bi-planar geocomposite designated Transnet 330. See Exhibits P-012 through P-022, true and exact copies of the order, delivery and payment. Defendants made another similar purchase the following month. Notwithstanding, Defendants have recently asserted the same Transnet 330 product slated for delivery to a customer of Plaintiff’s infringes the ‘188 patent.

24. Construction for a landfill located in Middlesex County, New Jersey (“Middlesex Project”) has begun or is expected to begin in the very near future and the elements necessary to establish the landfill base, such as the geocomposites, must be manufactured and shipped immediately in order to comply with the Middlesex Project schedule. The geocomposite subcontract for the Middlesex Project has a value of several million dollars and has become the subject of vigorous competition between the Defendants and SKAPS.

25. The Middlesex Project specifications as originally issued required a Tenax manufactured geocomposite Model Tendrain 7100-2 or approved equivalent. Upon information and belief this is the same or substantially identical product described above with reference to *Exhibits P-002 through P-022*. As there were no known geocomposites with high-flow values equivalent to the upper limits of the Tendrain 7100-2; Tenax expected to receive the Middlesex Project geocomposite subcontract.

26. However, the later-issued Middlesex Project Addendum No. 3 expanded the geocomposite alternatives to include geocomposites with lower flow values by other manufacturers. After Addendum No. 3 issued, SKAPS Transnet 330 geocomposite was considered, approved, and selected for the Middlesex Project by the geocomposite subcontractor. The Middlesex Project specifications directed to the geocomposite, as amended, fall below the limitations of Claims 1 – 6 of the ‘188 patent.

27. On or about January 3, 2008, after SKAPS was awarded the contract to supply SKAPS geocomposite for the Middlesex Project, Mr. Giovanni Capra, in his apparent capacity as an agent of Tenax, sent a letter regarding the ‘188 patent to the Middlesex Project geocomposite installer and customer of SKAPS. Mr. Giovanni Capra’s letter caused that SKAPS customer to question its order to

purchase the approved SKAPS geocomposite. See Exhibit P-023, a true and correct copy.

28. On or about January 16, 2008, Mr. Giovanni Capra, in his capacity as an agent of both Defendants, traveled to the Northern District of Georgia and met with representatives of Engineered Synthetic Products, Inc. (“ESP”). ESP is a Georgia domiciled distributor of SKAPS geocomposite who sold the SKAPS geocomposite for the Middlesex Project. During that meeting Mr. Giovanni Capra told ESP that any SKAPS geocomposite scheduled for the Middlesex Project infringes the ‘188 patent. During that meeting, Mr. Giovanni Capra handed ESP a letter from AGS dated January 8, 2008 and related to the ‘188 patent. See Exhibits P-024, P-025, a true and correct copy.

29. The following day, on or about January 17, 2008, Mr. Giovanni Capra in his apparent capacity as an agent of Tenax, sent to ESP a letter from Tenax confirming the meeting of January 16th and asserting certain SKAPS geocomposites infringe claims 1 – 6 of the ‘188 patent. See Exhibits P-026, P027, a true and correct copy.

30. On or about February 15, 2008, counsel for SKAPS sent a letter to Mr. Giovanni Capra explaining that the SKAPS geocomposite to be manufactured and shipped to the Middlesex Project according to Addendum No. 3 does not

infringe the '188 patent, but if it does, that the SKAPS geocomposite anticipates the '188 patent. In support of the defense of anticipation, counsel for SKAPS provided Mr. Giovanni Capra copies of invoices showing SKAPS geocomposite, manufactured to the flow values of the geocomposites for the Middlesex Project, were sold well before one year prior to the filing of the '188 patent. See Exhibits P-028 through P-032, a true and correct copy.

31. On or about February 20, 2008, Mr. Giovanni Capra in his capacity of Chief Operating Officer of Tenax, sent a letter to counsel for SKAPS dismissing the evidence of anticipation "*as not relevant with respect to the validity of claims 1 – 6 of the '188 patent*" and stating Tenax "*as the licensee of the patent in reference will forcefully defend its right on all jobs your client will offer composites which performance will infringe claims 1 to 6, Middlesex being one of them.*" See Exhibits P-033, P-034, a true and correct copy.

32. Since the filing of the original Complaint, Plaintiff has come to understand the '188 patent improperly issued because material facts appear to have been withheld from or otherwise not considered by the USPTO examiner, such as pre-critical date activities including offers for sale of the Tendrain product that meets Claims 1 – 5 of the '188 patent; offers for sale, sales, and public use of high-flow bi-planar geocomposites that meet at least some of lower performance

specifications of Claims 4 – 5 of the ‘188 patent; and the USPTO examiners apparent oversight in not fully considering unrelated U.S. Patent 6,599,058, wherein the ‘188 patent performance specifications of Claims 1 – 5 are disclosed (See *Exhibit P-035*; Col. 3, lines 24 – 65).

33. A case of actual controversy exists between SKAPS and Defendants. SKAPS denies Defendants’ collective accusations of infringement and moreover seeks a ruling that the ‘188 patent is not infringed by any SKAPS geocomposite, and/or the ‘188 patent is unenforceable, and/or the ‘188 patent is invalid.

FIRST CAUSE OF ACTION
(NON-INFRINGEMENT OF U.S. PATENT NO. 7,309,188)

34. The allegations of Paragraphs 1 through 33 are incorporated by reference.

35. Defendants have alleged that the SKAPS geocomposite to be delivered for the Middlesex Project infringes the ‘188 Patent.

36. SKAPS specifically pleads non-infringement of the ‘188 patent, and seeks a Declaratory Judgment that SKAPS geocomposite does not infringe any validly issued claim in the ‘188 patent and that it does not induce or contribute to the infringement of the ‘188 patent by others.

SECOND CAUSE OF ACTION
(INVALIDITY OF U.S. PATENT NO. 7,309,188)

37. The allegations of Paragraphs 1 through 36 are incorporated by reference.

38. SKAPS specifically pleads invalidity of the '188 patent, and seeks a Declaratory Judgment that the '188 patent is invalid due to non-compliance with at least the provisions of 35 U.S.C. §§ 102 and 103.

THIRD CAUSE OF ACTION
(UNENFORCEABILITY OF U.S. PATENT NO. 7,309,188)

39. The allegations of Paragraphs 1 through 38 are incorporated by reference.

40. SKAPS specifically pleads unenforceability of the '188 patent, and seeks a Declaratory Judgment that the '188 patent is unenforceable due to inequitable conduct before the USPTO in violation of at least the provisions of 37 CFR. § 1.56.

PRAYER FOR RELIEF

WHEREFORE, SKAPS respectfully requests this Court to:

A. Enter a Declaratory Judgment that Defendants are without right or authority to threaten or maintain alleged infringement of the '188 patent.

B. Enter a Declaratory Judgment that all claims of the '188 patent are invalid, unenforceable, and void in law;

C. Enter a Declaratory Judgment that SKAPS has not infringed, induced others, or contributed to the infringement of the '188 patent;

D. Order that Defendants pay liquidated or unliquidated damages as provided by law.

E. Order that Defendants, jointly and severally, award SKAPS its attorneys' fees pursuant to 35 U.S.C. § 285;

F. Order that Defendants, jointly and severally, pay all costs associated with this action; and,

G. Such other and further relief as this Court deems just and proper.

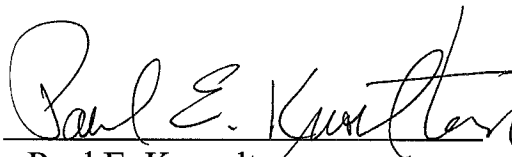
DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff PBR, Inc. d/b/a Skaps Industries hereby demands a trial by jury on all issues so triable as a matter of right.

This is the 21st day of March, 2008

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,



By: Paul E. Knowlton
Georgia Bar No. 801809
pknowlton@parksknowlton.com

Cynthia R. Parks
Georgia Bar. No. 563929
cparks@parksknowlton.com

Counsel for Plaintiff PBR, Inc. d/b/a SKAPS Industries
Parks Knowlton LLC
1117 Perimeter Center West
Suite E402
Atlanta, Georgia 30338
(678) 325-6601 (Phone)
(678) 325-6605 (Facsimile)

Certificate of Compliance

The above signed counsel hereby certifies that this pleading was prepared in Times New Roman using 14 point font and thus complies with LR 5.1, NDGa.